United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1140

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TO BE ARGUED BY
ALAN NEIGHER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1140

UNITED STATES OF AMERICA

PLAINTIFF-APPELLEE

V.

DAVID N. BUBAR, ET AL.

DEFENDANT-APPELLANT

BRIEF OF DEFENDANT-APPELLANT RONALD BETRES

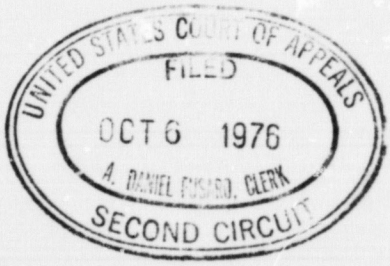

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TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITIES

STATUTES | PAGE

QUESTIONS PRESENTED

1. Was John Shaw's In-court Identification of Ronald Betres Improperly Admitted At Trial Under the Strict Exclusion Rule of Braithwaite v. Manson?

2. If John Shaw's In-court Identification of Ronald Betres Was Not Subject to a Strict Rule of Exclusion, Should It Have Been Excluded As Derived From a Procedure Having A Substantial Liklihood of Misidentification?

3. Did the Government Meet Its Burden of Establishing An Independent Source for The Subsequent In-court Identification of Ronald Betres by John Shaw, Untainted By Improper, Out-of-Court Procedures?

4. If the Admission of Shaw's Identification Was Erroneous, Was It Harmless Error?

5. Did The Trial Court Err In Failing to Grant Defendant's Motion For a Mistrial or Judgement of Acquittal In Light of the Prosecutor's "Improper, Uncalled For, and Illegal" Remarks on Summation?

6. Was Ronald Betres Prejudiced by The Failure of the Trial Judge To Sever His Case From Co-defendant Bubar?

7. Did The Trial Court Err In Failing to Instruct the Jury on the Elements of the Underlying State Offense Required For Conviction Under the Travel Act?

8. Did the Trial Court Err In Refusing to Permit Counsel to Impeach the Credibility of John Shaw With Further Testimony From Loretta Marley?

STATEMENT OF THE CASE

On May [illegible], 1975 defendant Ronald Betres (herein referred to as "R. Betres", to avoid confusion with defendant Peter Betres) was charged in a twelve-count indictment in the United States District Court for the District of Connecticut for crimes arising out of the March 1, 1975 firebombing of Plant No. 4 of the Sponge Rubber Products Company, at Shelton, Connecticut (herein referred to as the "Shelton Fire"). Prior to jury selection, the indictment was consolidated into six counts. The indictment was applicable to R. Betres as follows:

1. Conspiracy to Violate the Travel Act (18 U.S.C. §371) by: (a) traveling from Pennsylvania to Danbury, Connecticut and thence to Shelton on or about February 28, 1975; (b) being in the Sponge Rubber Plant on March 1, 1975; and (c) abducting three Sponge Rubber Plant employees on March 1, 1975;

2. Travel Act (18 U.S.C. §§1952 and 2) by traveling in interstate commerce from Pennsylvania to Connecticut with intent to promote, manage, carry on and facilitate arson, in violation of §53a-111 of the Connecticut General Statutes;

3. Transportation of Explosives (18 U.S.C. §§844(d) and 2), by transporting in interstate commerce dynamite, detonating or primer cord and blasting caps to destroy Plant No. 4;

4. Handgun (18 U.S.C. §§924(c) and 2) by carrying a handgun during the commission of a felony;

5. Racketeering Activity (18 U.S.C. §§1962(c) and 2) by associating for the purpose of burning and destroying buildings through "a pattern of racketeering activity";

6. Receiving and Possessing A Firearm (26 U.S.C. §§5861(d) and 18 U.S.C. §2) by aiding and abetting the receiving and possessing a firearm or a destructive device consisting of dynamite, detonating or primer load, blasting caps and gasoline.

On October 7, Judge Newman dismissed the Racketeering Activity Count. Also on October 7, co-defendant John Shaw pleaded guilty to the Conspiracy and Travel Act Counts and agreed to testify for the Government. On October 8, jury selection was completed. On October 16, after several days of pre-trial motions and voir dire hearings, the jury was sworn and the Government called its first witness.

On October 21, Judge Newman denied the motions of defense counsel to suppress John Shaw's photographic and proposed in-court identification of defendants.

On December 1, the Government rested. Ronald Betres called no witnesses, did not testify, and offered certain stipulated testimony concerning his presence at work the Monday after the fire and his absence from work the Friday preceding the fire.

On January 7, 1976, Rule 29 motions were heard. R. Betres moved for judgment of acquittal on all counts. Judge Newman granted the motion with respect to the Transportation of Explosives Count[1] and the Handgun Count[2].

On January 8, an amended four-count indictment was filed.

On January 13, Judge Newman denied R. Betres' motion for acquittal, or in the alternative, for mistrial, based upon the United States Attorney's closing summation.

When the case went to the jury on January 14, R. Betres faced three counts: conspiracy, Travel Act and aiding and abetting the receipt and possession of a destructive device; all other defendants-appellants here faced these three charges and the transportation of explosives count.

On January 19, the jury returned verdicts of guilty on all four counts as to defendants Bubar and Dennis Tiche.

After over two weeks of deliberations, on January 29, the jury returned verdicts of guilty on the conspiracy and Travel Act counts as to R. Betres, Just, Coffey and Peter Betres; the jury further reported that they were deadlocked on the transportation of explosives and destructive device counts. After Judge Newman gave the jury a modified Allen charge, deliberations were resumed.

1/ This Count was dismissed as to R. Betres only on the grounds that there was no evidence that he had participated in that offense.

2/ Granted as to all defendants under United States v. Ramirez, 482 F. 2d 807 (2d Cir. 1973).

On February 3, after nearly a week of further deliberations, the jury returned a verdict of not guilty as to R. Betres on the destructive device charge; the jury found defendant Peter Betres guilty of the transportation and destructive device counts.

On February 5, the trial court granted Just and Coffey's motions for mistrials on the remaining two counts. On February 11, the trial court granted defendant Michael Tiche's motion for a mistrial as to all counts.

On March 22, Judge Newman sentenced R. Betres to two consecutive five year terms of imprisonment on the conspiracy and Travel Act Counts. At that time, the trial court denied R. Betres' post trial motion for judgment of acquittal and treated the motion as alternatively requesting a new trial. The Court further denied R. Betres' request for sentencing under §4208(a) (2). On March 23, R. Betres filed a notice of appeal to the Court.

R. Betres is free on bond pending the outcome of this appeal. He is awaiting prosecution by the State of Connecticut on kidnapping and arson charges also arising out of the Shelton Fire.

STATEMENT OF FACTS

In this trial, the Government claimed that R. Betres was one of three abductors of the Sponge Rubber employees taken out of Plant Four prior to its destruction on March 1, 1975. The Government charged that R. Betres traveled on Friday, February 28, with two other co-defendants - Coffey and Just - from Pennsylvania to the Holiday Inn in Danbury, Connecticut; the three met on the afternoon of Saturday, March 1, at the Howard Johnson's in Derby with other co-defendants; they were later driven by Bubar to Plant Four, where they remained until preparations for the explosion were completed; R. Betres, Just and Coffey then abducted guards Albert Hanley, Ray Ranno and boilerman Robert DeJoy prior to the time of the explosion; the three employees were later released unharmed.

The Government's case against R. Betres consisted of:

(1) the testimony of John Shaw, a co-defendant who played a major role in the planning and execution of the fire;

(2) one fingerprint taken from a room at the Holiday Inn in Danbury; and

(3) a record of a collect phone call made from a pay telephone on the New Jersey Turnpike to R. Betres' home in Butler, Pennsylvania a few hours after the fire.

Shaw's testimony was the only evidence putting R. Betres at Plant Four at any time. The fingerprint was the only evidence putting R. Betres at the Holiday Inn in Danbury. The

phone records served to corroborate the Government's contention that R. Betres was headed back to Pennsylvania at a time previously testified to by Shaw, in an automobile which Shaw had earlier described.

R. Betres neither testified nor called any witnesses. He stipulated with the Government that (a) he was not at work in Butler, Pa. on the Friday before the fire (February 28) and (b) that he was at work the Monday after the fire. Via cross-examination and summation, R. Betres attacked Shaw's credibility, particularly as to Shaw's identification of him as one of the three abductors of the Plant Four employees. That identification, as will be seen below, was in trouble in several major respects. The Shaw identification was of paramount importance in this case, since none of the Plant Four or Holiday Inn employees identified R. Betres.

Thus, without Shaw's testimony, the Government's case against R. Betres was wholly circumstantial.

The alleged fingerprint of R. Betres (Exh. 70) was claimed by the Government to have been lifted from Room 118 of the Holiday Inn in Danbury on March 7, or six days after the fire. It was one of eight impressions taken from the room (Tr. 4873).

R. Betres argued that Exh. 70 did not show that R. Betres' known print was the same as the latent print lifted from Room 118. As will be shown below, the fingerprint was not

corroborated by eyewitness identification of R. Betres by any of the Holiday Inn employees.

The phone call record (Exh. 75) which was admitted over counsel's timely objections (Tr. 6037-6039) showed only that a collect call had been made from the New Jersey Turnpike in Cranbury, New Jersey to R. Betres' home in Pennsylvania during the early morning hours of March 2, 1975. The defendant's name was misspelled "Betrice" on the exhibit. There was no evidence as to the name of the caller, the receiver of the call, or the contents of the call.

On January 13, 1976, in his rebuttal argument, the United States Attorney stated:

> "Ronald Betres has in no way explained the telephone call made from New Jersey the early morning hours collect to his own phone in Pennsylvania. His fingerprints are there in Derby, and they were explained by Mr. Oliver. No questions were asked"[3/] (emphasis added) (Tr. 10891).

Judge Newman then instructed the jury:

> "...to whatever extent the argument of government counsel called upon any defendant to testify or to explain away any evidence, to whatever extent that may have occurred, such argument was improper, uncalled for and illegal...the argument may not be taken that way at all, and I have instructed you not to take it that way..." (Tr. 10907-10908).

The Court then denied R. Betres' motions for judgment of acquittal or mistrial based on rebuttal (Tr. 10908).

3/ The Government had claimed that only one fingerprint of R. Betres was found, and that the print was lifted from the Holiday Inn in Danbury.

ARGUMENT

I. SHAW'S IN COURT IDENTIFICATION OF R. BETRES WAS IMPROPERLY ADMITTED AT TRIAL

For purposes of this argument, it is necessary to set forth in some detail the circumstances surrounding Shaw's identification of a photograph of R. Betres, the difficulties Shaw had with his subsequent in-court identification of R. Betres, and the inability of every other Government witness to make an in-court identification of R. Betres as being at Plant Four, or at the Danbury Holiday Inn, or anywhere in Connecticut.

When Shaw was taken into custody by the FBI at Pittsburgh on April 10, 1975, and after he agreed to cooperate with the Government, Agent Fitzpatrick gave Shaw one photograph of R. Betres (Exh. 40E). Shaw wrote "Ronnie" on the back of the photograph, together with his initials and the date. Fitzpatrick could not recall how long Shaw took before he identified the photograph; he testified that Shaw did not indicate (nor, apparently, was he asked) how long he had to observe "Ronnie", or the lighting conditions of that observation, other than stating that he saw "Ronnie" in the morning and again in the evening of March 1, 1975 (Tr. 1311-1313).

Shaw was on the stand for one and one-half days with the defendants in the courtroom before the Government asked Shaw to make his identifications. Shaw had been told by the United States Attorney that the person he identified as "Ronnie" or

"Ron" would be in the courtroom at the time he made his identification (Tr. 2671, 2734, 3036). At a voir dire on in-court identification procedures, the United States Attorney testified that on the day before his in-court identification of the defendants, Shaw said "that he was less than absolutely positive about his ability to identify Pete Betres and Ronald Betres" (Tr. 2670).

In fact, Shaw's "identification" of R. Betres was substantially inaccurate, confused and inconsistent.

Shaw, in two separate statements given to the FBI on April 10 and April 11, 1975, said that the person he named "Ron" had a Vandyke beard (Tr. 3032). Shaw repeated this before the Grand Jury on April 11, 1975 (Tr. 3032-33) and again on voir dire outside of the presence of the jury (Tr. 2221). At the beginning of his testimony before the jury, on October 21, 1975, Shaw described "Ron" or "Ronnie" as having a Vandyke moustache and a shaved head, covered by a cap (Tr. 2522). When he made his in-court identification of R. Betres, Shaw indicated that the individual he pointed out may have changed his appearance (Tr. 2647). Upon further questioning, Shaw testified that on March 1 and March 2, 1975 R. Betres may have had his head shaved, and that was the only difference in his appearance (Tr. 2649). After questioning on the appearances of two other defendants, the United States Attorney, realizing

that Shaw's description of R. Betres was inconsistent with his earlier descriptions, asked Shaw whether the person Shaw called "Ron" had any facial hair at the time Shaw observed him on March 1 or 2. Shaw said he wasn't sure, but the person named Ron "might" have had a "VanDyke type moustache".[4/] (Tr. 2650)

Before the Grand Jury, Shaw testified that Ron or Ronnie was between 6' and 6' 3" in height (Tr. 3036). On voir dire outside of the presence of the jury, Shaw testified that Ron or Ronnie was "Six foot; six foot, one." (Tr. 2221). On cross-examination, Shaw stated that his own height was approximately 5' 10", and that anyone between 6' and 6' 3" would be taller than himself. Shaw said that he had the opportunity to observe the person he called Ron or Ronnie standing up on at least six occasions. At the request of counsel, Shaw stepped down from the stand and stood next to R. Betres. Their height was virtually identical[5/] (Tr. 3038).

4/ The Government did not call any other witnesses to testify as to whether R. Betres had either shaved his head or sported a Vandyke at the time of the Shelton Fire.

5/ The record does not show the similarity in height between Shaw and R. Betres. Admittedly, counsel should have asked the Court to have the record so state. However, it is not anticipated that the Government will dispute that Shaw and R. Betres, standing next to each other in full view of the jury, were exactly the same height, with R. Betres being slightly shorter than Shaw.

None of the three Plant Four employees could identify the abductors, who wore ski masks. Al Hanley could give no description at all (Tr. 4680-4681). Roy Ranno told the FBI shortly after the fire that all three abductors were approximately 5' 10" in height (Tr. 4747); on cross-examination Ranno testified that he was not sure of the abductors' height, since he had approximately six seconds to observe them (Tr. 4751). Robert DeJoy saw only two of the abductors, both of whom were described as being 5' 10" to 5' 11" in height and of heavy build (Tr. 4756).

None of the Danbury Holiday Inn employees could identify R. Betres as one of the three men who stayed there between February 28-March 1, 1975.

Deborah Iovino, a front desk clerk, described a heavy-set bald man as 6' in height who asked for directions to Shelton. Ms. Iovino said she believed she could identify the man. She could not. The United States Attorney then asked if that person had any facial hair. She replied in the negative (Tr. 4480).

Robert Brown, another Holiday Inn employee, never identified R. Betres, or anyone resembling him (Tr. 4487-4533).

Kelsey O'Connor, a maid at the Holiday Inn, could not make an in-court identification of a bald-headed man she had earlier described on voir dire, and could only say that without hair and

without glasses, either of two men in the courtroom could have been that man[6] (Tr. 4611-4612; 4620-4622).

Christine Keston, a bartender at the Holiday Inn, could only testify that one of the three persons was bald. She could not describe height, weight, build or any other characteristic of that person (Tr. 4641).

Joan Tallman, a cocktail waitress at the Holiday Inn, served a table with the three gentlemen in question. She described one as a bald man, broad in the shoulders, whom she observed several times from a distance of only inches (Tr. 4652). Ms. Tallman had selected R. Betres' photograph from an FBI spread (Exh. 58), stating that she wasn't sure that R. Betres was the bald man (Tr. 4656). Ms. Tallman could not make an in-court identification of R. Betres (Tr. 4653).[7]

In light of these facts Shaw's in-court identification of R. Betres was improperly admitted at trial.

6/ While the record is silent on the point, these men were R. Betres (dark jacket, sitting in the front row) and P. Betres (light jacket, sitting in the back rown (Cf. Tr. 4612).

7/ The Assistant United States Attorney, Mr. Dow, asked this question of Ms. Tallman, after she stood up, examined the gallery, and could not make an identification:

Q: Is there anyone here you think is similar to that person? (emphasis added)

A: No, I couldn't say definitely.

A. Shaw's Out-of-Court Identification Testimony Was Derived From An Unnecessarily Suggestive Photographic Show-up[8], and Subject to Strict Exclusion at Trial

Shaw was shown only one photograph of R. Betres (Hearing Exh. 40E) at FBI headquarters in Pittsburgh on April 10, 1975 (Tr. 1311-1312). Prior to his being shown the photograph, Shaw spoke on the telephone with United States Attorney Peter Dorsey for forty-five to fifty minutes (Tr. 2739). After that telephone conversation, Shaw was interviewed by FBI agents for approximately six hours. After three or four hours, a portion of the interview was devoted to the showing of photographs, including the photographic show-up at issue here (Tr. 2740). Shaw was told by the United States Attorney that R. Betres would be in the courtroom when Shaw would be asked to make his in-court identification (Tr. 2671, 2734, 3036). The United States Attorney asked Shaw if he would be able to identify anyone whose photo had been shown to him. Shaw said yes.[9]. (Tr. 2734).

In Braithwaite v. Manson, 527 F. 2d 363, 371 (2d Cir. 1975), cert. granted, 96 S. Ct. 1737 (1976) this Court held that Stovall v. Denno, 388 U.S. 293 (1967) and its progeny require that

8/ The term "photographic show-up" as used herein describes the showing of only one photograph to a witness.

9/ Recall that the defendants had been sitting in the courtroom since the beginning of Shaw's direct testimony on October 21.

identification unnecessarily obtained by impermissibly suggestive means must be excluded.

There is no question that the procedure used here was unnecessarily suggestive. After being taken into custody and extensively questioned, and after speaking on the telephone with the United States Attorney for the District of Connecticut, and having been "turned around" for the Government in an extensively publicized criminal case, Shaw was given one photograph of R. Betres - whom he said he had never seen prior to March 1, 1975 (Tr. 2519)-and asked if he knew the man. The result was inevitable.

Further, the procedure used by the Government was absolutely unnecessary. Shaw was in custody at the time of the photographic show-up. There was no suggestion of his flight or unavailability. The Government had abundant time to obtain an array of photographs to show Shaw.

For all of these reasons, the in-court identification of R. Betres by Shaw was derived from an unnecessarily suggestive photographic show-up, and was subject to strict exclusion under Braithwaite, supra. The admission of Shaw's identification of R. Betres at trial was error.

B. Even If a Strict Rule of Exclusion Is Not Applicable, Under Neil v. Biggers, the Shaw Identification Should Have Been Excluded As Derived From A Procedure Having A Substantial Likelihood of Misidentification

In Braithwaite, supra, this Court held as an alternative basis for reversing the respondent's conviction that respondent's rights under the due process clause were violated by use of a photographic identification procedure which was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification.

In so holding, this Court held that application of the "totality" standards of Neil v. Biggers, 409 U.S. 188 (1972) showed a substantial likelihood of misidentification. Even if a strict rule of exclusion is not applicable here, application of Biggers would lead to the same conclusion as in Braithwaite: the Shaw identification should have been excluded as having been derived from a procedure having a substantial likelihood of misidentification.

Under Biggers, the reliability of an identification may be evaluated in view of several factors:

> As indicated by our cases, the factors to be considered in evaluating the liklihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation and the length of time between the crime and confrontation. 409 U.S. at 199.

Briefly evaluating these indicia against the record of this case reveals:

1. Shaw may have had some opportunity to observe the man he called "Ron" or "Ronnie". The FBI agent who showed Shaw the photo of R. Betres testified that Shaw did not indicate how long he had to observe "Ronnie" (other than he saw him in the morning and again in the evening) or the lighting conditions of those occasions; Shaw later testified that he observed "Ronnie" at the Howard Johnson's in Derby on the afternoon before the fire, several times in Plant Four and in an automobile from Shelton to New York City, where Shaw sat behind "Ronnie" (Cf. Tr. 3024). However, it should be noted that at Plant Four, one meeting was held in a virtually pitch black room, and the three abductors were wearing ski masks (Tr. 3025-3026, 3030). Furthermore, the ride to New York was in a dark car, seating six people, with the person Shaw called "Ron" driving and Shaw in the back seat (Tr. 2220).

2. Shaw's degree of attention was, at best, diverted. At the Howard Johnson's Shaw was introduced to several people he had never before met (Tr. 2519, 3023-3024). Shaw's attention was directed to several people, not merely to "Ron". During their encounter at Plant Four, Shaw was in the process of planting the materials for the plant's destruction, which involved placing numerous containers of gasoline, explosives,

and detonating cord throughout the plant, and connecting the entire system to a timing device (Tr. 2556-2568).

3. Shaw's prior description of R. Betres was substantially inaccurate and inconsistent. On five separate occasions prior to his in-court identification of R. Betres--in two FBI 302 reports given on April 10 and April 11, 1975 (Tr. 3032), before the Grand Jury on April 11 (Tr. 3032), on voir dire outside of the presence of the jury on October 20, 1975 (Tr. 2221) and at the beginning of his direct testimony in front of the jury on October 21, 1975 (Tr. 2522)--Shaw said "Ronnie" had a Vandyke moustache. When asked whether "Ronnie" had changed his appearance, Shaw first said only that R. Betres may have had his head shaved at the time of the fire (Tr. 2649). When asked a second time, Shaw said he wasn't sure, but the person he identified "might" have had a "Vandyke type moustache" (Tr. 2650).

Shaw told the Grand Jury that "Ron" or "Ronnie" was between 6' and 6' 3" tall (Tr. 3036). On voir dire outside of the presence of the jury on October 20, 1975, Shaw testified that "Ron" or "Ronnie" was "Six foot; six foot, one" (Tr. 2221). As noted above, when standing next to R. Betres in open court, in full view of the jury, Shaw stood at virtually the same height as R. Betres--5' 10".

4. The record does not reveal that Shaw was certain of his photographic identification of R. Betres. It is clear that:

(a) Shaw had asked the United States Attorney whether he would have to make his in-court identifications on his first day of direct testimony, (b) the Government did not call upon Shaw to make his identifications until Shaw had over a full day to observe the defendants in the courtroom, (c) the United States Attorney asked Shaw if he would be able to identify anyone whose photo had been shown to him (Tr. 2734), (d) Shaw was told by the United States Attorney that the people he would be called upon to identify would be in the courtroom (Tr. 2671, 2734, 3036), (e) Shaw told the FBI case agent, S.A. McNamara, that he was reluctant to make in-court identifications of the defendants (Tr. 2678), and (f) Shaw had told the United States Attorney on the day before his in-court identification of the defendants that he "was less than absolutely positive about his ability to identify...Ronald Betres." (Tr. 2670).

It is clear that Shaw was markedly uncertain of his photographic identification of R. Betres.

5. Nearly six weeks elapsed between the crime and the photographic show-up. It is not disputed that Shaw claims to have observed R. Betres on March 1-2, 1975, and that the photographic show-up here occurred on April 10, 1975, or approximately forty days after the crime.10/

10/ The photographic show-up in Braithwaite occurred only two days after the crime.

Even assuming, arguendo, Shaw's claimed opportunities to observe the person he called "Ron" or "Ronnie", it is clear that Shaw's degree of attention to that person was diverted and interrupted, that his prior description of that person was substantially inaccurate and inconsistent, that Shaw was markedly uncertain of his photographic identification of R. Betres and that an extensive period of time elapsed between the crime and the photographic show-up.

It must be further noted that Shaw was not a victim, see United States v. Reid, 517 F. 2d 953 (2d Cir. 1975), or a disinterested bystander, but an actual participant in what has been commonly referred to as the largest industrial arson in the history of the United States. In Braithwaite, supra, this Court observed that the identifying person, Glover, was "an undercover agent whose business was to cause arrests" and whose possible incentive to make an identification could not be lightly dismissed. 527 F. 2d at 371. Glover's incentive to make an identification palls in comparison to Shaw, who knew that his exposure was a matter of decades, and that helping himself meant identifying other co-defendants.

Thus, applying to the record here the factors suggested by the Supreme Court in Biggers, referred to by this Court in Braithwaite, the impermissible suggestiveness of the photographic show-up resulted in a substantial likelihood of misidentification.

C. There Was No Independent Basis For Shaw's In-court Identification of R. Betres.

Once an out-of-court identification is determined to be invalid, the burden shifts to the Government to establish an independent source for a subsequent in-court identification untainted by improper, out-of-court procedures. United States v. Wade, 388 U.S. 218, 240 (1967).

No such proof of an untainted source for the in-court identification is present here. The factors set forth in Biggers, outlined above, need not be repeated again. Even assuming, arguendo, Shaw's claimed opportunities to observe R. Betres, Shaw's attention was diverted, his description of "Ron" or "Ronnie" was substantially inaccurate and inconsistent, Shaw was demonstrably uncertain of his photographic identification of R. Betres, and six weeks elapsed between the time of the claimed observation and the photographic show-up.

That Shaw made an identification of R. Betres at trial deserves no consideration. As noted above, that identification occurred after Shaw had observed the defendants in the courtroom for over one day. Shaw was demonstrably uncertain of his photographic identification of R. Betres. Because Shaw was asked to concentrate on only one photograph, there was a strong probability that he would retain an image of the photograph,

rather than the image of the person he called "Ron" or "Ronnie" when he entered the courtroom at trial, thereby reducing the trustworthiness of subsequent line-up or court-room identifications. Simmons v. United States, 390 U.S. 377, 383 (1968).

The length of time between the crime and the in-court identification also dramatically limited the reliability of Shaw's in-court identification. The evidentiary phase of the trial began on October 16, seven and one-half months after the crime. Delay between the offense and the time of trial has been recognized by this Court as of critical importance. In United States v. Reid, supra, the delay was less than three months. Here, the delay is over four and one-half months longer than in Reid.

The record thus discloses that the Government has failed to establish an independent source for Shaw's in-court identification of R. Betres as one of the three abductors. Since Shaw's in-court identification was absolutely critical to the determination of R. Betres' culpability, this Court should reverse R. Betres' conviction.

D. The Erroneous Admission of Shaw's In-court Identification of R. Betres Was Not Harmless Error

As repeatedly noted above, Shaw's testimony was the only evidence putting R. Betres at Plant Four on March 1. The trial court's charge directed the jury's attention to the Shaw testimony putting R. Betres at Plant Four. In his instructions on Count 2, the Travel Act count, Judge Newman charged:

> The Government contends that eight of the nine defendants did travel from one state to another on or about February 28...that Just, Coffey and Ronald Betres went from Pennsylvania to Danbury, Connecticut and then to the plant (Tr. 10934) (emphasis added).

On the element of intent, Judge Newman charged:

> ...if you find that Ronald Betres was one of the trio at the Holiday Inn in Danbury and if you find he was one of the trio that abducted the plant guards, you might still conclude that there is no evidence of his having done anything to plan for the arson before he traveled to Connecticut. (Tr. 10937) (emphasis added).

With reference to the essential element which requires the doing of some act after the interstate travel to promote or carry out the arson, Judge Newman charged:

> [T]he Government contends that eight of the defendants did perform such an act after their interstate travel. They contend that...Just, Coffey and Ronald Betres abducted the guards... (Tr. 10938) (emphasis added).

Judge Newman then gave a special instruction as to defendant Albert Coffey:

> I instruct you that Coffey may not be found guilty on Count 2 even if you find he rented the Avis truck unless you also find beyond a reasonable doubt that he was in the plant on March 1 (Tr. 10939) (emphasis added).

Later, as to Count 1, conspiracy, Judge Newman charged that "conspiracy is established if at least one member of the conspiracy knowingly performed at least one overt act in furtherance of the conspiracy" (Tr. 10956). Under the indictment, Overt Acts, M, P, and Q, R. Betres was charged with (1) traveling from Pennsylvania to Danbury, and then to Shelton on February 28, 1975; (2) being at Plant 4 on March 1, 1975; and (3) abducting the guards on March 1, 1975.

In his marshalling of the evidence, Judge Newman told the jury:

> John Shaw places Ron Betres at the Derby Howard Johnson's on March 1 and in Plant 4 later that evening. Shaw says he (R. Betres) was one of those in the third floor office and also one of the trio that abducted the guards. Shaw says Ron Betres left the plant with him and was part of the group of six that drove back to New York (Tr. 11004) (emphasis added).

It is clear that the jury was continuously directed to focus its attention on R. Betres at Plant Four. The only evidence putting R. Betres at Plant Four was Shaw's identification. No other evidence put R. Betres at or near the building. None of the Plant 4 employees identified R. Betres. No other witness put him in an automobile anywhere in Connecticut.

None of the Holiday Inn employees could identify R. Betres in the courtroom.

The length of time that it took the jury to convict R. Betres on Counts 1 and 2 (January 14-January 29, or 12 days of deliberations) coupled with R. Betres acquittal on February 3 as to Count 4 is substantial evidence that this jury had great difficulty in convicting R. Betres.

The error in the admission of Shaw's identification of R. Betres was, at the least, harmful.

II. THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION FOR A MISTRIAL OR JUDGMENT OF ACQUITTAL IN LIGHT OF THE GROSSLY IMPROPER AND PREJUDICIAL REMARKS ON SUMMATION BY THE UNITED STATES ATTORNEY

In his opening and closing summation the United States Attorney made repeated reference to the failure of certain of the defendants who did not testify to offer evidence or explain away Government evidence.[11/] In his opening summation, the United States Attorney made reference to the failure of certain defendants who cross-examined the Government handwriting

11/ E.g., Conners (Tr. 10732-33, 10871-73); P. Betres (10853 10854); Bubar (10853, 10864-65, 10866, 10895-96); Michael Tiche (10885); Coffey (10891); Just (10,872 "there is a lot of things missing...").

and fingerprint experts to offer contrary testimony (Tr. 10736-37).

R. Betres was a victim of such improper prosecutorial comment. Near the end of his closing summation, the United States Attorney said to the jury:

> Ronald Betres has in no way explained the telephone call made from New Jersey the early morning hours collect to his own phone in Pennsylvania. His fingerprints (sic) are there in Derby (sic), and they were explained by Mr. Oliver. No questions were asked. (Tr. 10891).

At the end of the summation, Judge Newman gave an immediate cautionary instruction which essentially told the jury: "...when any argument is made that somebody didn't say something, that's the argument of the lawyers. That's in no way a reference to a defendant not doing something." (Tr. 10898). Counsel for P. Betres, joined by other counsel, including the undersigned, moved for a judgment of acquittal or for a much stronger remedial instructions. The jury was called back, and Judge Newman instructed them that:

> ...to whatever extent the argument of Government counsel called upon any defendant to testify or to explain away any evidence, to whatever extent that may have occurred, such argument was improper, uncalled for and illegal. (Tr. 10907-08).

With the jury excused, Judge Newman denied all defense motions for mistrial and judgments of acquittal (Tr. 10908), noting that the comments of the prosecutor were "unfortunate" and that "if this was a one-day trial" he might have granted the motions (Tr. 10909).

R. Betres adapts the arguments of counsel for A. Just, A. Coffey and P. Betrés on this point, adding only the following discussion:

(a) the comment by the United States Attorney here was not an isolated remark. In fact, these remarks were extensive, and were directed to several of defendants who did not take the stand (see Note 11, supra).

(b) The remark in question "naturally and necessarily" referred to the failure of defendant R. Betres to take the stand on his own behalf. United States ex rel d'Ambrosio v. Fay, 349 F. 2d 957, 959 (2d Cir. 1965), cert. denied 382 U.S. 921. The reference was clear and unmistakable. The only person who could adequately "explain" a collect telephone call to his own home was defendant R. Betres. See United States v. Handman, 447 F. 2d 853, 855 (7th Cir. 1971); U.S. ex rel Leak v. Follette, 418 F. 2d 1266, 1269 (2d Cir. 1969). What Mr. Dorsey told the jury was: if R. Betres was innocent, why didn't he come forward and tell us what he was doing at a pay telephone station on the New Jersey Turnpike a few hours after the fire?

(c) The remark here, unlike those in Follette, supra, United States v. LaSorsa, 480 F. 2d 522, 526 (2d Cir. 1973), United States v. Bivona, 487 F. 2d 443, 447 (2d Cir. 1973); or in United States v. Nasta, 398 F. 2d 283, 285 (2d Cir. 1968)

was not invited. No comment by defense counsel concerning the telephone call was made, in closing argument, or at any other time.[12/]

(d) The remark came in the Government's closing summation, with no opportunity for the defense to reply.

(e) The case against R. Betres was a close one. The problems with Shaw's identification of R. Betres have been discussed at length above. In addition, alone among the defendants-appellants here, Count 3 (transportation of explosives) was dismissed as to R. Betres because of lack of evidence before the case went to the jury. Also alone among defendants-appellants here, R. Betres was acquitted on Count 4 (aiding and abetting the possession of an explosive device). The jury deliberated over two weeks before reaching guilty verdicts on Counts 1 and 2.

In United States v. Burse, 531 F. 2d 1151 (2d Cir. 1976), this Court reversed a bank robbery conviction on the basis of prosecutorial misconduct, including comment on the failure of the defendant to testify on his own behalf.[13/] The Court

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12/ As noted above, Judge Newman, in his remedial instruction to the jury after the prosecutor's summation, noted that the argument was "uncalled for" (Tr. 10908) (emphasis added).

13/ "(c) The prosecutor in his closing remarks implied that the failure of the defendant to provide proof of his innocence was to be taken as evidence of his guilt and came dangerously close to direct comment on Burse's failure to take the stand, remarking that 'the defendant did not tell you about all the truths.'" 531 F. 2d at 1154.

noted that

> in an admittedly close case such as this one, prosecutorial misstatements take on greater importance, whether those statements are intentional or not. 531 F. 2d at 1155.

See also, United States v. White, 486 F. 2d 204 (2d Cir. 1973); United States v. Handman, supra.

As in Burse, and unlike United States v. McCarthy, 473 F. 2d 300, 304-305 (2d Cir. 1972), this case is a close one, for reasons set forth in detail above. In the absence of any corroborative evidence to bolster Shaw's testimony putting R. Betres at Plant 4, the evidence against R. Betres was, at best, circumstantial.

(f) A prompt curative instruction was not sufficient to neutralize the prejudice to R. Betres. Unlike the facts in United States v. Dioguardi, 492 F. 2d 70, 81-82 (2d Cir. 1974), a securities fraud case where the defendant could have refuted the Government's evidence in a number of ways, only the defendant R. Betres could have contradicted or "explained" the phone call in question. See United States v. Collins, 383 F. 2d 296, 302 (7th Cir. 1968).

The prosecutorial misconduct here clearly prejudiced R. Betres. In a case as close as this one, where the defendant's Fifth Amendment right to remain silent was clearly violated, and where the improper remark was blatent and uncalled for, the conviction should be reversed.

III. THE DEFENDANT WAS PREJUDICED BY THE FAILURE OF THE TRIAL JUDGE TO SEVER HIS CASE FROM DEFENDANT BUBAR

Defendant-appellant R. Betres joins in and adapts the arguments of co-defendants Peter Betres and David N. Bubar (especially relying upon the brief and supplemental appendix of Paul W. Orth, Esq., counsel for David N. Bubar).

One additional observation should be noted. In addition to the bizarre, disruptive and unprofessional conduct of trial counsel for Bubar, the evidence against Bubar was overwhelming. In contrast, and as noted in detail above, the case against R. Betres was extremely close, largely circumstantial, and demonstrably troublesome for the jury. As noted by counsel for Peter Betres, prejudice to one or more co-defendants can occur from the weight of accumulated evidence against other co-defendants. United States v. Kelley, 349 F. 2d 720, 759 (2d Cir. 1965). When the vast, substantial evidence against Bubar is coupled with the disruptive tactics of his trial counsel, the prejudice in a close case to defendant R. Betres becomes clearly apparent.

IV. THE COURT ERRED IN FAILING TO INSTRUCT THE JURY ON THE ELEMENTS OF THE UNDERLYING STATE OFFENSE REQUIRED FOR CONVICTION UNDER THE "TRAVEL ACT" (COUNT 2)

Defendant-appellant adapts the arguments and claims of counsel for Albert Coffey (see the Brief of Albert Coffey, pp. 26-29).

V. THE TRIAL COURT ERRED IN REFUSING TO PERMIT COUNSEL TO IMPEACH THE CREDIBILITY OF JOHN SHAW WITH FURTHER TESTIMONY FROM LORETTA MARLEY

Defendant-appellant adapts the arguments and claims of counsel for Dennis Tiche (see the Brief of Dennis Tiche, pp. 12-17).

CONCLUSION

The conviction of Ronald Betres on Counts 1 and 2 should be reversed and the case remanded for a new trial.

THE DEFENDANT-APPELLANT
RONALD BETRES

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Dated: October 1, 1976

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief were sent, postage prepaid, to: Paul Orth, Esq., Hoppin, Carey & Powell, 266 Pearl Street, Hartford, Connecticut 06103, J. Daniel Sagarin, Esq., 855 Main Street, Bridgeport, Connecticut, 06604, Igor I. Sikorsky, Jr., Esq., 111 Pearl Street, Hartford, Connecticut 06103, Gregory B. Craig, Esq., c/o Elliot Noyes, 210 Country Club Road, New Canaan, Connecticut 06840, Peter C. Dorsey, United States Attorney, P. O. Box 1824, New Haven, Connecticut 06511, and Andrew B. Bowman, Esq., Federal Public Defender, P. O. Box 1824, New Haven, Connecticut 06511, on the 1st day of October, 1976.

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